



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/158161

PRELIMINARY RECITALS

Pursuant to a petition filed June 09, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance, a hearing was held on July 15, 2014, at Port Washington, Wisconsin.

The issue for determination is whether the agency properly terminated the Petitioner's recreational services at Portal, Inc. effective June 17, 2014.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: April Cherone
Community Care Inc.
205 Bishops Way
Brookfield, WI 53005

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Ozaukee County.

2. Petitioner is 30 years old. Her primary diagnosis is Down Syndrome. She currently resides in an adult family home (AFH) with two adult male roommates. Petitioner has lived at the AFH since March 29, 2012.
3. Petitioner is enrolled in the FC program. On May 21, 2014, the agency completed its annual review of the Petitioner's member-centered plan. Petitioner, her parents/guardians, her FC team and her AFH providers were present.
4. On May 30, 2014, the agency completed a Resource Allocation Decision (RAD) tool. It indicates that the Petitioner's long term outcome is to lose 1 pound/month. It also states that Petitioner's parents would like her to make healthier food choices and to continue with socialization opportunities in the community, with peers in and outside the home.
5. Petitioner's current activities include attending church 1x/week with family, family outings, working three days/week, Friendship Club 1x/month, Zumba 1 – 2x/week, tutoring sessions, volunteering 1x/week, and attending Portal recreational activities 4x/month. It finds that the Petitioner's socialization goals are adequately met with natural and community supports as well as the paid support of the AFH. It concluded it would end the Petitioner's Portal recreational activities.
6. Petitioner has been involved in Portal activities for 8 years. The program has over 100 participants and offers approximately 20 activities each month. Petitioner is able to choose 4 activities each month.
7. The Petitioner's AFH participates with 4 – 5 other AFHs (Balance AFHs) in organizing large group activities for residents. Total potential participants in these activities include 21 participants, 15 males and 6 females. The activities are optional for residents.
8. On June 2, 2014, the agency issued a Notice of Action to the Petitioner informing her that her Portal recreational activities would be terminated effective June 17, 2014. The bases for the denial were noted to be:

The service or support is not an effective way to support Petitioner's outcomes.

The Petitioner does not need this service or level of service or support to support her outcome.

The agency is already supporting her outcome in another way.

Informal support (or other support) is available to provide this service or support this outcome.

This service or support is not the most cost-effective way to support her outcome.

10. On June 9, 2014, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Family Care Program (FCP), which is supervised by the Department of Health and Family Services, is designed to provide appropriate long-term care services for elderly or disabled adults. Medicaid Eligibility Handbook (MEH), §29.1. It is authorized under Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code at Chapter DHS 10. The program is operated and administered in each county by a Care Management Organization (CMO). Though Family Care enrollees are full partners in the assessment of needs and strengths and in the development of care plans those plans are subject to the general requirements and limitations outlined for the program, including the requirement that a service be cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes. DHS §§10.44(2)(e) & (f), Wis. Adm. Code. Medical assistance and its subprograms are meant to provide only basic and necessary health care.

In the FCP, a case management organization (CMO) must develop an Individual Service Plan (ISP) in partnership with the member. Wis. Adm. Code, §DHS 10.44(2)(f). The ISP must reasonably and effectively address all of the member's long-term needs and outcomes to assist the member to be as self-reliant and autonomous as possible, but nevertheless must be cost effective. While the member has input, the CMO does not have to provide all services the member desires if there are less expensive alternatives to achieve the same results.

DHS 10.44 Standards for performance by CMOs.

...

(2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:

...

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate . . . The service plan shall meet all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e) 1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)(2) and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes. ...

Wis. Admin. Code § DHS 10.41(2) states that:

Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n (c) and ss. 46.275, 46.277 and 46.278, Stats., the long-term support community options program under s. 46.27, Stats., and specified services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

The Division of Hearings and Appeals can only exercise authority that has been delegated to it. With respect to Family Care the Wisconsin Administrative Code delegates hearing authority where the appeal is directly to the Division of Hearings and Appeals as follows:

...

(a) Denial of eligibility under s. DHS 10.31 (6) or 10.32 (4).

- (b) Determination of cost sharing requirements under s. DHS 10.34.
- (c) Determination of entitlement under s. DHS 10.36.
- (d) Failure of a CMO to provide timely services and support items that are included in the plan of care.
- (e) Reduction of services or support items in the enrollee's individualized service plan, except in accordance with a change agreed to by the enrollee.***
- (f) An individualized service plan that is unacceptable to the enrollee because any of the following apply:
 1. The plan is contrary to an enrollee's wishes insofar as it requires the enrollee to live in a place that is unacceptable to the enrollee.
 2. The plan does not provide sufficient care, treatment or support to meet the enrollee's needs and identified family care outcomes.
 3. The plan requires the enrollee to accept care, treatment or support items that are unnecessarily restrictive or unwanted by the enrollee.
- (g) Termination of the family care benefit or involuntary disenrollment from a CMO.
- (h) Determinations of protection of income and resources of a couple for maintenance of a community spouse under s. DHS 10.35 to the extent a hearing would be available under s. 49.455 (8) (a), Stats.
- (i) Recovery of incorrectly paid family care benefit payments as provided under s. DHS 108.03 (3).
- (j) Hardship waivers, as provided in s. DHS 108.02 (12) (e), and placement of liens as provided in ch. HA 3.
- (k) Determination of temporary ineligibility for the family care benefit resulting from divestment of assets under s. DHS 10.32 (1) (i).

...

Wis. Admin. Code, § DHS 10.55(1); also see Stats., §46.287.

It is clear that the discontinuance of Petitioner's Portal services does fall within the legal authority of the Division of Hearings and Appeals.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980) In this case, the agency is the moving party, because it wishes to change the status quo, by terminating Petitioner's recreational activity program at Portal, Inc. Thus, the agency has the burden to prove that its actions were correct.

At the hearing, the agency testified that it made the decision to terminate the Petitioner's Portal recreational activity programming as part of the RAD process because she has sufficient activities from natural and community supports as well as activities with her AFH that meet her outcome of continuing with socialization. Specifically, the agency asserts that the AFH is required to provide recreational services as part of its licensing requirements and that it does provide community outings and socialization opportunities to the Petitioner. It notes that the Petitioner's family also meets her need for socialization when she has family outings. In addition, the agency notes that the Petitioner does volunteer work, participates in a friendship club, works three days/week and attends exercise class.

The Petitioner's parents/guardians testified on the Petitioner's behalf at the hearing. The guardians dispute the agency's revisions to the Petitioner's service plan, made as part of the RAD process. Specifically, the guardians dispute the removal of the Petitioner's socialization outcome and the resulting discontinuance of Portal recreational activities.

The RAD process requires the agency to get the input of the Petitioner and guardians in formulating a service plan and services to meet the Petitioner's needs. The agency provided insufficient information to

demonstrate a reason for removing the Petitioner's socialization outcome which has been a part of all of her previous plans. The RAD tool does not note any discussion with the Petitioner or guardians about whether the outcome should continue to be a part of her service plan. The guardians testified that there was discussion about Petitioner's activities, including the Portal activities, but no discussion about whether the outcome or services related to it would be discontinued. The guardians had no inkling that the outcome would be removed and were surprised to find it had been removed. They refused to sign the Petitioner's plan without the socialization outcome. Clearly, the RAD process was not followed in the manner for which it was intended.

The Petitioner's parents produced a list of activities offered by the AFH that the Petitioner participated in between January – July, 2014. No calendar of planned Balance activities was provided at the hearing. A calendar of the activities that the Petitioner chose to participate in between January – July, 2014 was produced. The Petitioner participated in 15 activities in 7 months including shopping, birthday parties/cookouts, ladies night, movies, bowling, a picnic, a dance and a fish fry. There is no evidence of how many other residents participated in these activities. I note that the Petitioner participated in the majority of these activities in January and February (10 activities). From March – July, 2014, the Petitioner participated in only 5 Balance activities. It is unknown whether this was because Petitioner chose not to participate or because there were fewer activities offered.

Petitioner's parents assert that the Portal activities are consistent and varied and provide an opportunity for the Petitioner to make choices. They also contend that the activities are of a variety that support the Petitioner's goal to lose weight. They note that the Petitioner is restricted in the AFH activities by the interests and time of the other residents and staff. Specifically, they related that the Petitioner was required to leave an activity when one of the other residents of her AFH wanted to leave. Also, they note that there are no other females in the AFH and only 6 females in the Balance program.

The agency argues that the Petitioner leads a very busy life and participates in a wide range of activities. It notes that the AFH must plan activities based on the preferences of the residents. It notes that the AFH and Balance activities provide a variety of large group and small group activities. Also, the agency representatives testified that the AFH provides spontaneous activities that are more akin to a family setting. They assert that the Petitioner's outcome to lose weight can be better supported by the AFH staff that know her and can help her to make good choices.

A review of the Portal, Inc. schedule for July and August reveals that the program offers a wide variety of activities and offers a different activity nearly every day. The Petitioner is able to choose four activities. Approximately 100 people participate in Portal, Inc. activities. The Petitioner has been attending the activities at Portal for 8 years and has made many friends.

I am not convinced that the Balance and AFH activities are a substitute for the Portal activities. The Petitioner is young and likes to engage in socialization activities with peers. Work, volunteer and exercise classes provide limited opportunity for socialization as the focus of these activities is not socialization. Balance and AFH activities are inconsistent in frequency and variety and are thus limited in socialization opportunities, especially for females. Petitioner currently attends 4 Portal activities/month. Approval of these Portal activities is not intended to be an open ended approval of any dollar amount for FCP payment. I am, therefore, limiting the approval to the current four Portal activities a month but with a total cost to the FCP not to exceed the base cost of the activity.

CONCLUSIONS OF LAW

Based on the evidence, the Petitioner's outcome for socialization should be continued in her service plan and Portal recreational activities of 4/month should be continued to meet her needs.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to take the steps necessary to continue the Petitioner's socialization outcome in her service plan and continue Petitioner's participation in Portal activities at a frequency of up to 4 times per month but with the cost limited for FCP payment to the base price of the Portal activity.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

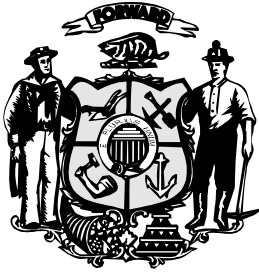
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 2nd day of September, 2014

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 2, 2014.

Community Care Inc.
Office of Family Care Expansion